STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 24, 2003
v	No. 234915 Wayne Circuit Court
PATRICO RAMONEZ, Defendant-Appellant.	LC No. 00-009286

Before: Talbot, P.J. and Neff and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of third-degree home invasion, MCL 750.110a(4), assault with intent to commit great bodily harm less than murder, MCL 750.84, and aggravated stalking, MCL 750.411i. Defendant was sentenced as a third habitual offender, MCL 769.11, to concurrent terms of two to ten years' imprisonment for home invasion, twelve to twenty years' imprisonment for assault and two to ten years' imprisonment for stalking. We affirm but remand for correction of defendant's sentence. [1]

I. Basic Facts

Defendant and the victim have a history of domestic violence. The victim, defendant's former girlfriend and mother of two of defendant's sons, obtained a personal protection order against defendant. At trial, the victim testified that in the early morning hours on April 21, 2000, defendant forced his way into her home, assaulted, choked, and punched her eventually chasing her onto the porch. On the porch, she saw defendant's two other sons standing at the end of the stairs with another man. Defendant punched the victim again on the shoulder causing her to fall. Defendant then strangled her and threatened to kill her. Renee Tames put his hands over the victim's mouth to stop her from screaming. Eventually, the two other men put defendant into the car and drove off. Police observed red marks to the victim's neck and bruising on her shoulder.

At trial, defendant testified in his own defense, despite defense counsel's advice to remain silent. Defendant testified that he went to the victim's home, but claimed she let him in willingly. Defendant also testified he was angry because he did not see his children and the

[1] Defendant was originally charged with first-degree home invasion. The judgment of sentence incorrectly indicates that defendant was convicted of the original charge.

victim appeared to be "high." Defendant denied choking and threatening the victim, stating that he only pushed her. He also refuted the victim's testimony that he left threatening messages on her answering machine, but conceded that he had struck the victim in the past.

II. Ineffective Assistance of Counsel

Defendant first argues that the trial court erred in denying his motion for new trial on the basis that he was denied the effective assistance of counsel. We disagree.

A trial court's decision whether to grant a new trial is reviewed for an abuse of discretion. *People v Lebbett*, 251 Mich App 353, 358; 650 NW2d 407 (2002). Appellate review of an ineffective assistance of counsel claim involves a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review a trial court's findings of fact for clear error and constitutional questions de novo. *Id.* at 579.

A defendant seeking a new trial on the ground that trial counsel was ineffective bears a heavy burden. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *Carbin, supra*. First, the defendant must show that counsel's performance was deficient, i.e., that counsel made errors so serious that counsel was not performing as the "counsel" guaranteed by the Sixth Amendment. *Id.* The defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* Second, the defendant must show that the deficient performance prejudiced the defense, i.e., a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Failure to call a witness can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

We are not persuaded that defense counsel was ineffective for not calling defendant's two sisters as witnesses. Neither sister had personal knowledge of the charged offenses. While they allegedly would have testified that the victim called them sometime after the offense, their testimony would not have refuted the victim's version of the relevant events. Moreover, defense counsel explained at the post-trial *Ginther*[2] hearing that he decided not to call the sisters as witnesses because one sister's memory was shaky and the other sister was reluctant to testify. Based on the record, we find that defendant has failed to overcome the presumption of sound trial strategy.

We also reject defendant's assertion that defense counsel was ineffective for failing to call the three men who were present during the incident giving rise to the charges. After the prosecution rested and outside the presence of the jury, defense counsel informed the trial court

[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

of his opinion that the defense should rest without calling any witnesses. In his opinion, the cross-examination was sufficient to place the victim's testimony in doubt. Defense counsel also stated that he did not believe he should call any witnesses unless defendant testified; however, because in his opinion defendant should not testify, he would not be calling any witnesses. Defense counsel further informed the trial court of his belief that if any of the three witnesses did testify, they would be arrested. Furthermore, the prosecutor stated that if any of the witnesses testified, they would require counsel because they would be considered aiders and abettors. At the *Ginther* hearing, defense counsel reiterated his reasons for not calling any of three witness and testified additionally that the witnesses would not have been able to testify about what occurred between defendant and the victim inside the house, which was the focus of the defense theory.

At the conclusion of the *Ginther* hearing, the trial court found that defense counsel was a credible witness. The court noted defense counsel's strategy to focus on what occurred inside the house and his professional judgment that the three witnesses could not support this defense. The trial court also found that Joel Hackett was not a particularly helpful witness and that he had testified inconsistently that the men made no stops before going to Detroit. The trial court also found that Renee Tames was not a credible witness and that he contradicted Hackett. The trial court concluded that defense counsel investigated and presented a substantial defense and his decisions were well within professional standards. Finally, the trial court found the three witnesses would not have provided testimony that would have changed the trial's outcome.

We do not find clear error in the trial court's findings. Based on the lower court record and the *Ginther* hearing, we find that defense counsel's performance was not deficient with respect to his decision to not call the witnesses.

Defendant finally contends that he was deprived of the effective assistance of counsel at sentencing. He maintains that the trial court would have accepted his scoring challenges had counsel presented the three witnesses at the time of sentencing. At sentencing, the court must offer a defendant an opportunity to advise the court of any circumstances he believes the court should consider in imposing sentence. MCR 6.425(D)(2)(c). However, even assuming defense counsel could have presented the three witnesses under this provision, defendant has not established the requisite prejudice. *Carbin, supra* at 599-600. We find it is not reasonably likely that the court would have accepted the witnesses' version of the events, particularly considering that it found the witnesses lacked credibility at the *Ginther* hearing.

III. MRE 404(b)

Defendant argues that the trial court erred in admitting evidence of his prior assaults on the victim pursuant to MRE 404(b). We disagree.

The admissibility of other acts evidence is within the trial court's discretion and will be reversed on appeal only when there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). An abuse of discretion exists only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999).

To be admissible under MRE 404(b), other acts evidence must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be logically relevant to a matter at issue at trial, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. A proper purpose is one other than establishing the respondent's character to show his propensity to commit the offense. *Crawford*, supra at 385, quoting *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994).

We find that the trial court did not err in admitting evidence that defendant had assaulted the victim on prior occasions. The evidence was relevant to the elements of both the assault charge and the aggravated stalking charge. Additionally, it was offered for the proper purpose of proving these elements.

Defendant was charged with aggravated stalking, which is defined as stalking committed in combination with one of the factors described in MCL 750.411i(2)(a)-(d). *People v Kieronski*, 214 Mich App 222, 233-234; 542 NW2d 339 (1995). "Stalking" is defined in MCL 750.411i(1)(e) as a "willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed or molested." In this case, evidence of defendant's prior assaults was admissible to show the reasonableness of the victim's apprehension and that defendant engaged in a system or pattern of physical abuse against her. *VanderVliet, supra* at 74.

The elements of assault with intent to commit great bodily harm less than murder are: "(1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder." *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). This is a specific intent crime, *Id.* and the defendant's intent may be inferred from all the facts and circumstances surrounding the crime. *People v Lugo*, 214 Mich App 699, 709-710; 542 NW2d 921 (1995). Here, defendant's prior assaults were properly used to show defendant's intent.

We also find the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Crawford, supra* at 398. Here, the evidence of the prior assaults was not marginally probative, but rather, significantly probative of the elements discussed above. Moreover, any possibility of undue prejudice was avoided by the trial court's limiting instructions to the jury. *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002).

IV. Scoring of Offense Variables

Next, defendant contends three offense variables (OV) were incorrectly scored. We disagree.

"A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "'Scoring decisions for which there is any evidence

in support will be upheld.'" *Id*., quoting *People v Elliot*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

A. OV 7

The trial court properly scored OV 7 at fifty points. Pursuant to MCL 777.37, the trial court must score OV 7 at fifty points if the court finds evidence of terrorism, sadism, torture or excessive brutality. "'Terrorism' means conduct designed to substantially increase the fear and anxiety a victim suffers during the offense." MCL 777.37(2)(a). "'Sadism' means conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." MCL 777.37(2)(b).

Here, there was evidence that the victim was treated with terrorism and sadism. Defendant arrived at the victim's home in the early morning hours with three other men, repeatedly threatened to kill her, punched her, and choked her. He also called her repeatedly and told her he was on his way to kill her and that he would find her. This evidence supports a score of fifty points for OV 7.

B. OV 10

The trial court properly scored OV 10 at fifteen points. Pursuant to MCL 777.40(1)(a) fifteen points must be scored if there was predatory conduct involved. MCL 777.40(1)(a). "'Predatory conduct' means preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a).

Based on the record, we find defendant's conduct prior to the incident giving rise to these convictions shows that defendant, in a predatory fashion, sought the victim out on more than one occasion to inflict harm on her and harass her. We find this to support a score of fifteen points for OV 10.

C. OV 14

The trial court properly scored OV 14 at ten points. Pursuant to MCL 777.44, ten points are to be scored if the offender was a leader in a multiple offender situation. Based on the victim's testimony that defendant arrived at her home with three other men, that defendant was the person who threatened, choked and punched her, and that Renee Tames placed his hands over her mouth to stop her from screaming, the score of ten points was proper.

V. Sentencing Guidelines Departure

Finally, defendant argues that the trial court erred in departing from the sentencing guidelines for the assault conviction.[3] We disagree.

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[3] Because the offenses were committed in April 2000, this matter is controlled by the legislative sentencing guidelines. MCL 769.34(2); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000).

This Court reviews for an abuse of discretion a trial court's departure from the minimum sentence ranges recommended under the statutory guidelines; a trial court's departure is not an abuse of discretion if objective and verifiable factors support the substantial and compelling reasons given by the court for the departure. MCL 769.34(11); *People v Armstrong*, 247 Mich App 423, 424; 636 NW2d 785 (2001). A trial court must adhere to the sentence ranges prescribed by the legislative sentencing guidelines; thus, a judge's discretion in departing from those ranges is limited to the legislatively prescribed circumstances for a departure. *People v Hegwood*, 465 Mich 432, 438-439; 636 NW2d 127 (2001). A trial court may not base its departure on a characteristic of the offense or the offender already considered by the OV and prior record variable scores unless the court specifically finds from the facts on record that a disproportionate or inadequate amount of weight was given the characteristic. MCL 769.34(3)(b); *People v Hornsby*, 251 Mich App 462, 474; 650 NW2d 700 (2002).

Here, the sentencing guidelines recommended minimum sentence range for the assault conviction was 38 to 114 months. The court departed from this range and imposed a minimum sentence of 144 months (twelve years). At sentencing, the trial court stated that the guidelines did not adequately address what the victim suffered, citing the pattern of violence. The trial court also concluded that defendant did not respect the court system, was a continued danger to the victim, and could not be rehabilitated. The departure evaluation states that the departure was "due to extreme abuse to the victim; extreme violence to the victim and extreme terrorism."

Defendant points out that the court already scored twenty-five points under OV 13, reflecting a continuing pattern of criminal behavior, based on defendant's history of other assaults against the victim. However, the court was permitted to determine that OV 13 did not adequately account for the extreme nature of the past assaults. Defendant's disrespect for the court system and continued danger to the victim were also not adequately reflected in the guidelines. These factors were objective and verifiable based on evidence that defendant wrote letters to the victim after the offense, even though he was prohibited from contacting her by the court order. Therefore, we find that trial court did not abuse its discretion in departing upward from the sentencing guidelines range.

However, we agree with defendant that the judgment of sentence incorrectly indicates that he was convicted of first-degree home invasion when he was actually convicted of third-degree home invasion. Remand is required for correction of the judgment of sentence. *People v Avant*, 235 Mich App 499, 521; 597 NW2d 864 (1999).

Affirmed and remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ Kirsten Frank Kelly